

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

\* \* \*

CARLOS IBARRA-ROQUE,

Plaintiff,

v.

U.S. DEPARTMENT OF IMMIGRATION,  
*et al.*,

Defendants.

Case No. 3:22-CV-00250-ART-CLB

**REPORT AND RECOMMENDATION OF  
U.S. MAGISTRATE JUDGE<sup>1</sup>**

Before the Court is Plaintiff Carlos Ibarra-Roque's ("Ibarra-Roque") application to proceed *in forma pauperis*, (ECF No. 5), and amended civil rights complaint (ECF No. 4). For the reasons stated below, the Court recommends that Ibarra-Roque's *in forma pauperis* application, (ECF No. 5), be denied as moot, and the amended complaint, (ECF No. 4), be dismissed, based on a lack of jurisdiction.

**I. IN FORMA PAUPERIS APPLICATION**

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

Pursuant to the LSR 1-1: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the

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<sup>1</sup> This Report and Recommendation is made to the Honorable Anne R. Traum, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 applicant's income, assets, expenses, and liabilities."

2 "[T]he supporting affidavit [must] state the facts as to [the] affiant's poverty with  
3 some particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th  
4 Cir. 1981) (quotation marks and citation omitted). A litigant need not "be absolutely  
5 destitute to enjoy the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*,  
6 335 U.S. 331, 339 (1948).

7 A review of the application to proceed IFP reveal Ibarra-Roque cannot pay the  
8 filing fee. (See ECF No. 5.) However, because the Court recommends the complaint be  
9 dismissed without prejudice, but without leave to amend, the Court recommends the IFP  
10 application be denied as moot.

## 11 **II. SCREENING STANDARD**

12 Inmate civil rights complaints are governed by 28 U.S.C. § 1915A. Section 1915A  
13 provides, in relevant part, that "the court shall dismiss the case at any time if the court  
14 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a  
15 claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant  
16 who is immune from such relief." 28 U.S.C. § 1915A(b). A complaint is frivolous when  
17 "it lacks an arguable basis in either law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325  
18 (1989). This includes claims based on legal conclusions that are untenable (e.g., claims  
19 against defendants who are immune from suit or claims of infringement of a legal interest  
20 which clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,  
21 delusional scenarios). *Id.* at 327–28; *see also McKeever v. Block*, 932 F.2d 795, 798 (9th  
22 Cir. 1991). Dismissal for failure to state a claim under § 1915A incorporates the same  
23 standard applied in the context of a motion to dismiss under Federal Rule of Civil  
24 Procedure 12(b)(6), *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012), which  
25 requires dismissal where the complaint fails to "state a claim for relief that is plausible on  
26 its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

27 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom*  
28 *Ins. Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court must

1 accept as true all well-pled factual allegations, set aside legal conclusions, and verify  
 2 that the factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S.  
 3 662, 679 (2009). The complaint need not contain detailed factual allegations, but must  
 4 offer more than “a formulaic recitation of the elements of a cause of action” and “raise a  
 5 right to relief above a speculative level.” *Twombly*, 550 U.S. at 555. Particular care is  
 6 taken in reviewing the pleadings of a *pro se* party, for a more forgiving standard applies  
 7 to litigants not represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).  
 8 Still, a liberal construction may not be used to supply an essential element of the claim  
 9 not initially pled. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is  
 10 appropriate, a *pro se* plaintiff should be given leave to amend the complaint and notice  
 11 of its deficiencies, unless it is clear that those deficiencies cannot be cured. *Cato v.*  
 12 *United States*, 70 F.3d 1103, 1107 (9th Cir. 1995).

### 13 **III. SCREENING OF AMENDED COMPLAINT<sup>2</sup>**

14 In his amended complaint, Ibarra-Roque sues Defendants U.S. Department of  
 15 Immigration, ICE (Immigration and Customs Enforcement), and Acting Director D.  
 16 Johnson (collectively referred to as “Defendants”) under 42 U.S.C. § 1983. (See ECF No.  
 17 4.) Ibarra-Roque alleges that an ICE detainer has been placed on him without a due  
 18 process hearing. (*Id.* at 3.) Ibarra-Roque asserts due process and equal protection  
 19 violations and seeks monetary damages and for the immigration hold to be removed. (*Id.*  
 20 at 8.)

21 Although Ibarra-Roque has filed what purports to be a civil rights complaint  
 22 pursuant to 42 U.S.C. § 1983, the relief he seeks is judicial review of an immigration  
 23 detainer and an injunction to prevent future removal from being carried out. An  
 24 immigration detainer is a request to a law enforcement agency or prison to notify the  
 25 United States Department of Homeland Security (“DHS”) before it releases an alien upon  
 26 completion of his criminal sentence so that DHS may take custody of the alien for removal

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27 <sup>2</sup> Ibarra-Roque filed an amended complaint, (ECF No. 4), before the Court screened  
 28 his original complaint, (ECF No. 1-1). Accordingly, the amended complaint, (ECF No. 4),  
 is the operative complaint in this case.

1 proceedings. 8 C.F.R. § 287.7; see also *Galaviz–Medina v. Wooten*, 27 F.3d 487, 493  
2 (10th Cir. 1994) (“A detainer usually serves only as a notice to federal prison authorities  
3 that the INS is going to be making a decision about the deportability of the alien in the  
4 future.”). Accordingly, as the Ninth Circuit has explained, “the bare detainer letter alone  
5 does not sufficiently place an alien in INS custody to make habeas corpus available.”  
6 *Campos v. Immigration and Naturalization Service*, 62 F.3d 311, 314 (9th Cir. 1995)  
7 (quoting *Garcia v. Taylor*, 40 F.3d 299, 303 (9th Cir. 1994)); see also *United States v.*  
8 *Female Juvenile, A.F.S.*, 377 F.3d 27, 35 (1st Cir. 2004) (“[A]n INS detainer is not,  
9 standing alone, an order of custody. Rather, it serves as a request that another law  
10 enforcement agency notify the [Immigration and Naturalization Service] before releasing  
11 an alien from detention so that the INS may arrange to assume custody over the alien.”).  
12 In short, the detainer is only a notification that a removal decision will be made at some  
13 later date. *Campos*, 62 F.3d at 313–14. Thus, to the extent Ibarra-Roque is seeking an  
14 order from the district court declaring that federal immigration officials may not lawfully  
15 remove him from the United States. The Court does not have jurisdiction to grant such  
16 relief.

17 The REAL ID Act, 8 U.S.C. § 1252(a)(5), specifies that the exclusive method for  
18 obtaining judicial review of a final order of removal is to file a petition for review in the  
19 Court of Appeals. See *Flores-Torres v. Mukasey*, 548 F.3d 708, 710 (9th Cir. 2008); *Isa*  
20 *v. Smith*, 511 F.3d 881, 886 (9th Cir. 2007) (“The REAL ID Act changed the statutory  
21 regime . . . by eliminating all district court habeas jurisdiction over orders of removal.”  
22 (internal citations omitted)). Here, Ibarra-Roque is allegedly subject to an ICE detainer  
23 and potential removal and is seeking federal judicial intervention to preclude its  
24 enforcement. Under the REAL ID Act, Ibarra-Roque must pursue judicial review of his  
25 removal order in the Court of Appeals—not via a civil rights complaint in the federal district  
26 court. See *id.* (“Congress’ clear intent [was] to have all challenges to removal orders heard  
27 in a single forum (the courts of appeals)[.]” (citations omitted)). Thus, to the extent Ibarra-  
28 Roque is attempting to preemptively litigate any defense to future removal proceedings,

1 this Court lacks jurisdiction to address his claims. See 8 U.S.C. § 1252(b)(9) (“Judicial  
2 review of all questions of law or fact ... arising from any action taken or proceeding brought  
3 to remove an alien from the United States ... shall be available only in judicial review of a  
4 final order of removal ....”); 8 U.S.C. § 1252(a)(5) (“[A] petition for review filed with an  
5 appropriate court of appeals ... shall be the sole and exclusive means for judicial review  
6 of an order of removal ....”).

7 In sum, Ibarra-Roque’s claims are not cognizable in either a § 1983 action or a  
8 habeas corpus action in this court. Section 1252 of Title 8 of the United States  
9 Code allows only very limited judicial review of ICE orders and decisions. See 8 U.S.C. §  
10 1252 (stating which orders are reviewable and listing requirements to seek judicial  
11 review); *Reno v. American–Arab Anti–Discrimination Comm.*, 525 U.S. 471  
12 (1999) (interpreting 8 U.S.C. § 1252(g) to find no judicial review of ICE’s “decision or  
13 action to commence proceedings, adjudicate cases, or execute removal orders”).

14 Accordingly, for all these reasons, the Court is without jurisdiction to entertain  
15 Ibarra-Roque’s claims and the complaint should be dismissed for lack of jurisdiction.

#### 16 **IV. CONCLUSION**

17 For good cause appearing and for the reasons stated above, the Court  
18 recommends that Ibarra-Roque’s *in forma pauperis* application, (ECF No. 5), be denied  
19 as moot, and the amended complaint, (ECF No. 4), be dismissed, based on lack of  
20 jurisdiction.

21 The parties are advised:

22 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of  
23 Practice, the parties may file specific written objections to this Report and  
24 Recommendation within fourteen days of receipt. These objections should be entitled  
25 “Objections to Magistrate Judge’s Report and Recommendation” and should be  
26 accompanied by points and authorities for consideration by the District Court.

27 2. This Report and Recommendation is not an appealable order and any  
28 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the

1 District Court's judgment.

2 **V. RECOMMENDATION**

3 **IT IS THEREFORE RECOMMENDED** that the *in forma pauperis* application, (ECF  
4 No. 5), be **DENIED as moot**; and

5 **IT IS FURTHER RECOMMENDED** that the amended complaint, (ECF No. 4), be  
6 **DISMISSED for lack of jurisdiction.**

7 **DATED:** July 27, 2022.

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9 **UNITED STATES MAGISTRATE JUDGE**